IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 5 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KESARISINH PRATAPSINH CHAUHAN & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR PR ABICHANDANI for Appellant(s) : 1 - 2.
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 16/04/2007

CAV JUDGMENT

Present appeal is preferred under Section 374 read with Section 386 of the Code of Criminal Procedure, assailing the legality and validity of the

order of conviction and sentence passed by the learned Special Judge, City Civil Court, Ahmedabad in Special Case No.24 of 1989, on 25th October, 1991, whereby both the appellants-accused were convicted for the offence punishable under Sections 13 (1) (d) (i), (ii) and (iii) of the Prevention of Corruption Act and were sentenced to undergo simple imprisonment for two years and to pay a fine of Rs.1,000/-, in default thereof, to undergo simple imprisonment for three months.

2. Mr.P.R.Abichandani, learned Counsel appearing for both the appellants has taken me through the relevant part of the impugned judgment and order of conviction and sentence, so also, the main grounds of challenge mentioned in the paragraph 11 of the memo of appeal. On the other hand, Ms.Pandit, learned A.P.P., has also taken me through the oral as well as documentary evidence led during the course of trial. Before referring the gist of the submissions, it would be convenient to state the case of the prosecution in brief. Of course, the integrated case of prosecution is reflected in charge at Exh.4.

3. According to the prosecution, both the appellants were serving as unarmed Police Constable on 29th September, 1988 at Shahpur Police Station and were posted at Rangila Police Chowky of City of Ahmedabad. The complainant, Balchand Aatmaram filed a complaint against the appellant-original accused No.1, who was serving with D-Staff squad of Karanj Police Station. The appellant-original accused No.1 had booked a case against the complainant under Section 55 of the Bombay Prohibition Act, for possessing prohibited liquor. The Karanj Police Station was separated and on creation of Shahpur Police Station, service of accused No.1 was placed at Shahpur Police Station. The original accused No.1 impeached the complainant that he is selling prohibited liquor and therefore he should pay Rs.50/- as installment per month to him. Accordingly, the original accused No.1 demanded Rs.50/- on 29th September, 1988 and had agreed to accept the same. It is further the case of prosecution that complainant was not in a position to pay the said installment of Rs.50/- per month and he, therefore, was avoiding to pay but accused No.1 was in turn harassing the complainant since last three to four days prior to lodging of the complaint. The accused

No.1 told the complainant that, if he fails to pay the amount of Rs.50/- per month, he will file a false complaint against him under the N.D.P.S. Act. The appellant-original accused No.1 was making demand in the area situated opp. Reserve Bank of India Building, near the bank of Sabarmati River where the complainant was working. According to the prosecution, the complainant was otherwise running a paddle rickshaw and was doing labour work of delivering of cane furniture. The complainant was under pressure of demand of bribe and last meeting between the complainant and original accused No.1 was taken place on 27th September, 1988. However, the amount of bribe was not given by the complainant. The original accused No.1 told the complainant that he will collect Rs.50/- from him on the next date at about 7:00 p.m. and original accused No.1 had also given a threat to the complainant that, if he would not make the payment, a case was filed under N.D.P.S. Act against the complainant. The complainant under this pressure had decided to lodge the complaint against the original accused No.1 and in turn the Trapping Officer arranged the trap, calling two Panchas. As the amount of bribe was to be paid to the original accused No.1 on 29th September, 1988 at

about 13:35 hours on the west side of Gandhi Bridge, near Reserve Bank of India, both the appellants-accused went there at the place which was near one Hari Krishna Pan Center. Initially, the original accused No.1 was to come for accepting the bribe amount at 7:00 p.m., on 28th September, 1988 but the accused had not come, and so the trap was closed / suspended and the complainant was instructed to approach the A.C.B. Officials, if the demand of bribe was to be repeated. On 29th September, 1988 at about 8:30 a.m., when the complainant had reached at his work place near Pan Galla of one Naranbhai who was selling cold water had informed the complainant that yesterday the original accused No.1 met him at about 3:00 p.m., and was inquiring about him i.e. complainant. The said Naranbhai had also informed the complainant that he was asked by the original accused No.1-Kesharisinh to collect Rs.50/- from him and in turn he would collect the said amount from him in the evening on the next day. Therefore, the complainant had approached the A.C.B. Officials on 29th September, 1988. So, on 29th September, 1988 in the afternoon a trap was arranged and the raiding party was waiting for arrival of accused No.1. The accused No.1 came on two wheeler. The accused No.2 riding the rear sit

and on demand being made by the original accused No.1, the complainant gave bribe amount to the person sitting on the rear sit. That prior to handing over the muddamal currency notes to accused No.2 at the instance of accused No.1, some exchange of words took place between the complainant and complainant was asked to bring the packet of cigarette and in turn the complainant obeyed to the wish of accused No.1. As the accused No.2 had accepted the amount both the accused have been treated as accused though there is no reference to the name of accused No.2 in the first case which was placed before the A.C.B. Trapping Officer at the time of lodging complaint.

3.1 After the investigation, the Police found both the appellants-accused persons responsible for commission of offence punishable under the Prevention of Corruption Act and upon receipt of the sanction from the competent authority, the accused persons have been charge-sheeted and at the conclusion of the trial both the appellants-accused persons have been found guilty for the aforesaid offence.

4. According to Mr.Abichandani, the learned trial Judge has grossly erred in holding both the

accused guilty of the charge because there were no legal convincing and cogent evidence against any of these two accused persons. The learned trial Judge has ignored the settled legal position on appreciation of evidence and has recorded an incorrect finding of guilt. The Prosecution Witness No.1, complainant, Balchand Aatmaram, who has been examined at Exh.12 was declared hostile and has not supported the case of prosecution. Basically, the complainant, Balchand Aatmaram had checkered history and as he was regularly dealing in liquor business was aiming a transfer of accused No.1 from Shahpur Police Station. It is submitted that false trap has been arranged, as such there was no demand of installment of Rs.50/- by the accused No.1. The learned Judge has ignored the material conflict in the integrated story placed by the prosecution including the time factor which is very material and relevant in the present case. The complainant is a paddle rickshaw driver and was doing this activity in the day hours, and otherwise he was found involved in selling prohibited liquor and was knowing practically each Police Personnel working in the area of the complainant, including the accused No.1 and no reliance can be placed on the evidence of

complainant-Balchand Aatmaram who has turned hostile. It is further argued that the learned trial Judge has drawn inference on conjunctures. Some moral conviction of the Judge has weighed more than the facts available on record and details of legal evidence adduced by the prosecution. Only three material witnesses have been examined. One of them is the complainant, who is hostile witness and some material conflicts have been found in the depositions of Prosecution Witness No.2-Rajeshkumar Solanki who has been examined at Exh.13. The trial Judge ought not to have held that there is sufficient evidence as to the recovery of the muddamal currency notes from accused No.2 or any of the accused or accused No.2 had accepted the amount knowing it to be a bribe amount at the instance of accused No.1. The evidence of Prosecution Witness No.3-Shri V.J.Vyas, Police Inspector, who has been examined at Exh.17 was not sufficient to link the accused with the crime because after-all he is a Trapping Officer, interested in the result of the case. For the sake of argument if it is accepted that some part of evidence of Prosecution Witness No.3 can be read and considered as reliable piece of evidence, then also, the case would remain of mere recovery of the amount from accused No.2

which was not a party in demanding the bribe amount. It is not the case of the prosecution that accused No.2 had ever met the complainant in the company of accused No.1. The accused No.2 may be the innocent and he may not have accepted any amount under any agreement or any understanding or even implied knowledge that he is accepting the currency notes which is nothing but an illegal gratification.

4.1 It is further argued by Mr.Abichandani that there were more than one reasons for the complainant to implicate the accused No.1 in serious crime. The accused No.1 had never demanded the amount nor had asked the complainant to pay the bribe amount on a particular date and time. The prosecution has failed in answering various questions and those questions have been placed by Mr.Abichandani before the Court. The questions posed by Mr.Abichandani if are pointed out and can be taken care of while dealing with the submissions made and evidence read over to me to avoid repetition. The sum and substance of submissions of Mr.Abichandani is that there are number of infirmities and conflict and learned trial Judge has failed in addressing these infirmities and conflicts which has resulted into a grave error.

When on first day a raid was failed, the Trapping Officer ought to have acted in a transparent way because in the present case the anthracene powder has been used. At least at the time of arranging the trap i.e. on the next day, 29th September, 1988, the Trapping Officer ought to have selected the Panchas from different offices. Non-examination of Naranbhai and Panch Witness No.2 adversely affects to the finding recorded by the learned trial Judge. The Panch Witness No.1 (Prosecution Witness No.2) himself had accepted that he was “hard of hearing” and the learned trial Judge has attempted to get herself satisfied by asking the question during the examination of this Panch Witness. Normally the complainant and accused would not talk with a comparative loud tone and a person standing in a witness box in a Court Room, where everybody is supposed to keep maximum silence and everybody is supposed to be very attentive on each minor aspect, whether act of answering the question put-forward by the Presiding Officer to the witness would make him unreliable qua the facts stated by him that he is hard of hearing, is also a question. According to Mr.Abichandani because of that infirmity that has emerged from deposition of Panch Witness No.1

(Prosecution Witness No.2), there was no scope to link the accused with the crime. There is nothing on record to show that both the accused persons were in uniform. There is nothing in the impugned judgment about the duty hours of both the accused. Merely, because the accused No.1 had asked the complainant to bring the cigarette packet, any adverse inference could have been drawn against the accused or impliedly the accused No.1 would have been branded as corrupt or dishonest officer is the question. Because, there is nothing on record to show directly or indirectly that accused No.1 had not paid any consideration for the cigarette packet nor it was the intention of accused to pay any consideration for the said cigarette packet. It is true that doubtful integrity of public servants has an effect of poison in the society and therefore each corrupt Officer / Public Servant should be dealt with harshly and the presumption of innocent should not be stretched too much and that to beyond all reasonable probabilities. But the prosecution should attempt to prove the conduct of the accused by leading some convincing evidence and therefore the finding recorded against the accused on account of asking for bringing cigarette packet adversely affects to the objectivity

of the court. As the complainant was treated hostile, learned A.P.P., could have asked the complainant whether he was paid any consideration of the Bristol packet or whether the complainant had perceived the intention of the accused that he wants to enjoy cigarette at the cost of the complainant.

4.2 The learned trial Judge has considered inadmissible evidence while observing that Panchnama is a reliable piece of evidence because some crucial part of the Panchnama is nothing but the statement of accused which is inadmissible evidence in eye of law. On the date and time of trap, what was the location of Naranbhai or whether he was present or not, has not come on record. It was the month of September, in a hot city like Ahmedabad it was the correct business time for a person selling water occupying the small place on the public foot path as it was after 1:00 p.m. and before 2:00 p.m. What was the distance between the place where the bribe amount was accepted and shop of Pan Galla has also not come on record. Before linking the accused No.2 with the crime what was the distance between the accused No.1 and 2 was required to be established and the prosecution was required to prove that accused No.1

was able to listen the conversation between the complainant and the accused No.2, so also, whether any conversation had taken place between the complainant and the accused No.1. In absence of such evidence, accused No.2 ought not to have been linked with the crime.

4.3 In the present case the objectivity and fairness in investigation is lacking. When initial demand is not found to be proved, the second part of the Panchnama should be viewed with doubt. The Court should quash and set aside the conviction and sentence of both the accused and at least both of them deserves to be given the benefit of doubt.

4.4 While submitting that the accused deserves to be given the benefit of doubt, Mr.Abichandani has pointed out one aspect which makes the case of the prosecution more improbable. Both the accused were in the Police Department and it has come on record that one of the accused was knowing the member of the raiding party and accused had conversation with that member of raiding party personally, the question posed by Mr.Abichandani is that when a person from A.C.B. Department is present in the near vicinity and

that too with a view to keep watch, whether any of the accused would accept the bribe amount is the question, and the learned trial Judge has ignored this aspect. In such a situation, it was required to be observed that this is a mere recovery of muddamal currency notes and not a recovery of the bribe amount.

5. Ms.Pandit, learned A.P.P., has submitted that the learned trial Judge has discussed the lame defence placed by the accused. Accused No.1 was making repeated demand of Rs.50/- as "*Hapta*". Accused No.1 being outright corrupted person had no hesitation in accepting amount of bribe in a public view as that too at most busy road of Ahmedabad popularly known as Ashram Road. When it is not a matter of dispute that the area where the accused were trapped falls under the jurisdiction of Shahpur Police Station or adjacent to the area of Shahpur Police Station then, there is no reason for the learned trial Judge to discard the evidence of Police Inspector-Mr.Vyas and Prosecution Witness No.2 (Panch Witness No.1). It is satisfactorily proved that marks of anthracene powder were seen on the hands of the accused No.2. The prosecution was not supposed to

establish the fact of demand of bribe by accused No.2, because it is not the case of prosecution. The prosecution is consistent on the point that accused No.2 has accepted the amount on behalf of accused No.1 and under the instructions of accused No.1. There is sufficient evidence to prove the fact of demand of bribe amount made by the accused No.1. Of course, there is weak piece of evidence qua demand initially made, as the complainant has not supported the case of prosecution, but the conversation that had taken place immediately prior to passing of the currency notes clearly establishes that the bribe amount was demanded. In such a case, the initial demand can be presumed and therefore the learned trial Judge has held both the accused responsible. Panch Witness No.1(Prosecution Witness No.2) was present at the spot all through-out and there is no reason for the trial Court to discard his evidence. Why accused No.1 asked accused No.2 to accept the amount is a question. Accused No.2 ought to have refused to accept such amount but as as both were found guilty, a trap succeeded. The conversation between the accused No.1 and complainant has been proved. The behaviour of accused No.1 with complainant was friendly or unusual; why a Police

Personnel should act in such a casual manner and asked complainant to bring a cigarette packet. The learned trial Judge has correctly appreciated the conduct of the accused. Panch Witness No.1 has admitted to hold that accused No.1 was hard of hearing but ultimately he was caught by the Presiding Judge. The Presiding Judge is supposed to know domain and conduct of the accused for discarding the evidence whereby he has admitted that he is hard of hearing. The learned trial Judge has recorded her satisfaction on this point. There is no material error or illegality in the finding of the learned Special Judge and therefore the finding of conviction and sentence may be upheld.

6. There is no dispute as to the status of both the accused that they are public servant nor there is any controversy as to the legality and validity of the sanction to prosecute granted in the present case. The crucial question posed before the Court is whether the prosecution has satisfactorily proved that both the accused had demanded illegal gratification of Rs.50/- on 27th September, 1988 form the complainant-Balchand and that too by way of monthly installment. As per evidence on record, the

accused No.2 was not at all in picture so far as the demand of illegal gratification of Rs.50/- per month from the complainant is concerned. Accused No.2 had even prayed vide application at Exh.6 that he should be discharged but the said application was rejected and he has faced the prosecution. But, if the charge at Exh.4 is read alongwith the complaint recorded by Police Inspector, A.C.B. on 28th September, 1988, there is no case against the accused No.2 that he had demanded any illegal gratification. On the contrary, the basic story of the prosecution is that accused No.1 was demanding monthly installment since last three to four months alleging that complainant is selling liquor and therefore complainant would require to pay monthly installment of Rs.50/- and prior to about three days from the date of complaint, accused No.1 was repeatedly going at the place where complainant was sitting near one 'Pan Galla' on a public foot path and demanding the bribe and complainant was also given threat by accused No.1 that if complainant fails to give the amount, he would implicate the complainant in a false case under the N.D.P.S. referring the prohibited substance “Charas”. Thus, it is not even the case of prosecution that accused No.2 had either demanded the

bribe amount prior to 28th September, 1988 i.e. the date of complaint. As accused No.2 was not a party even in harassing the complainant then whether there was any scope for him to raise demand or to accept any illegal gratification from the complainant, is also a question. When the raid was arranged on the first day i.e. on 28th September, 1988, the same had failed / suspended. Even, when the raid was again arranged on 29th September, 1988, the accused No.2 was not in picture. Now, case placed by the prosecution and the evidence led is that muddamal currency notes were recovered from accused No.2, meaning thereby from a person who had never demanded the bribe amount. It appears that arrival of accused No.2 at the spot on two wheeler riding the rear sit was a matter of surprise, must be a matter of surprise or development so far as the members of raiding party and complainant are concerned. The learned trial Judge was under legal obligation to consider the written explanation given by accused No.2 in its legal perspective of a probability especially when he was not a party in demanding the bribe amount. According to accused No.2 he was asked to accompany accused No.1 by S.H.O. i.e. Police Sub Inspector and he was asked to be there on duty and the task given

to them was about tracing criminals and suspects. Of course, the prosecution is not supposed to lead the connective evidence in all cases unless such a negative evidence is badly required or with a view to expose false defence version. Here, there is no evidence of Sub Inspector of concerned Police Station or there was no reason for the learned trial Judge in discarding the say of accused No.2 that he was accompanying the accused No.1 as he was asked to be with accused No.1 by his Superior. When it is the case of the prosecution that when both the accused are serving under one Police Station, the say of accused No.2 is emerging as a probability. The case of the prosecution is that accused No.1 had demanded the amount. He was repeatedly demanding the amount of illegal gratification and accused No.1 had instructed Naranbhai to inform the complainant that he would come either in the evening or during afternoon hours and would collect Rs.50/- and Naranbhai was also asked to collect the amount of Rs.50/- from the complainant. It is the say of the prosecution that accused No.1 was to collect Rs.50/- from Naranbhai, so there was no certainty about arrival of accused No.1 at the place where Naranbhai was sitting to sell water on foot path which is the area near the Pan

Galla. Therefore, no fixed time was given either to Naranbhai or to the complainant. In the background of this fact the presence of accused No.2 is not emerging as incriminating circumstance against accused No.2 and if it is inferred that accused No.2 had accompanied accused No.1 on his two wheeler only with a view to accept money of illegal gratification vice accused No.1, would be nothing but a conjuncture or a surmise, because rest of the circumstances, except the recovery of the bribe amount from accused No.2 is not in conformity with the case placed by the prosecution.

7. Whether the fact of recovery of the bribe amount from accused No.2 has been satisfactorily proved by prosecution and the said amount was accepted by accused No.2 at the instance of accused No.1 understanding it fully that he is accepting Rs.50/- is the bribe amount and his role is of an agent on behalf of accused No.1 is a different aspect. But, it will be difficult for the Court to uphold the finding that accused No.2 was also a party in demanding the amount of bribe because there is no evidence under which it can be even legally possible to infer that accused No.2 had some conversation with

complainant immediately prior to acceptance of muddamal currency notes. It is settled that to bring home the charge the prosecution is supposed to establish first the demand or agreement or understanding between the bribe giver and offender accused in a cases where the bribe accepter is being prosecuted and therefore the actual passing of illegal gratification from the complainant to the accused and its acceptance. There is a thick shadow of doubt in the evidence, that the alleged acceptance of bribe of muddamal currency notes by accused No.2 was under any understanding between the complainant and accused No.2 and the Court should infer that there must be a scope of having some understanding between the accused No.1 and 2 would be a matter of guess for the Court. It is true that the Court is entitled to draw the reasonable inference but, here in the present case, the complainant has not supported the prosecution case and the say of Panch Witness No.1 (Prosecution Witness No.2) is that he was not able to hear the actual conversation that had taken place between the complainant and accused No.2. It is in evidence that on the direction given or wish expressed by accused No.1, the complainant had gone to nearby Pan Galla and had brought the cigarette

packet, but there is nothing in evidence to show that who had paid the consideration of the cigarette packet. Whether it was free from the Pan Galla or the amount was paid by the accused No.1 himself or by the complainant, are the questions that have remained unanswered. If the amount was paid by the complainant then whether there was any scope of contact of muddamal currency notes that were kept in his pocket, so the same can be given to accused No.1 on demand, is the question. But, it is certain that it is the say of the prosecution that event of passing of muddamal currency notes had taken place after returning of complainant from Pan Galla with cigarette packet. On close reading of the judgment under challenge it clearly emerges that the learned trial Judge has commented on this aspect while condemning the say of accused and drawing inference against the accused. For the sake of argument it is accepted that there is sufficient evidence to show that accused No.1 had asked the complainant to bring cigarette packet and in turn it was brought, but, this aspect is not contrary to the inconsistency or any infirmity of the case of demand of bribe. The accused No.2 was not even a party in asking the complainant to bring a cigarette packet, so, the

impression created in the mind of the Court is that the learned trial Judge to link the accused No.2 with the case of demand of bribe has considered same aspects which can be said to be not relevant or extraneous.

8. The learned trial Judge has condemned the Panch Witness No.1 and blamed him that he has attempted to help the accused. It is settled that if it is possible to accept evidence of a witness in part being cogent and trustworthy, the Court can rely on such part of evidence and can observe that rest part of the evidence of the very witness is not reliable or otherwise useful in fact finding exercise. Here, there are material contradictions in the evidence in the nature of conflict or in the nature of omission. If the evidence of Prosecution Witness No.2 is appreciated qua the demand of illegal gratification made immediately prior to its acceptance, the learned trial Judge has not recorded the legal and convincing finding on the issues.

9. When the Court is dealing with an appeal preferred under the provisions of Section 374 read with Section 386 of the Code of Criminal Procedure,

the Court is supposed to consider the entire evidence led by prosecution in the background of the basic structure of the case of the prosecution. Reevaluation of evidence and / or rewriting of the judgment also falls in the category of the appreciation that lies with the appellate Court.

10. Mr.Abichandani has drawn the attention of the Court that as regards the case of demand and acceptance qua the trap arranged on 29th September, 1988 is concerned, Naranbhai was the key witness. He is the person who had conveyed the complainant that accused No.1 came and was searching him. Naranbhai was also asked by accused No.1 to collect Rs.50/- and in turn accused No.1 would collect the same either in the evening or during afternoon hours. When the accused No.1 had reached to the spot where the trap was arranged, the fact regarding the distance between the complainant and Naranbhai has not come on record. So the repetition of demand of Rs.50/- so far as trap arranged on 29th September, 1988 is concerned, was made to Naranbhai and when no fixed time was given, how and why the raiding party had raided for trapping the accused No.1 in absence of evidence of Naranbhai, is a question. On the contrary, it emerges as one of

the probability that as the accused Nos.1 and 2 were on duty and in search of suspect while passing through the place where Naranbhai was selling water, accused No.1 might have inquired whether complainant had come and gave Rs.50/- to Naranbhai. But, it would not be proper for the Court to draw any surmise when the Prosecution Witness No.1 (Panch Witness No.1) has not led clear evidence, without any shadow of doubt on the conversation that had taken place between the complainant and the accused No.1 or between the complainant and accused No.2. Whether it would be safe to infer that the acceptance of muddamal currency notes by accused No.2 was under full understanding and / or with a knowledge that he is accepting the bribe amount on behalf of accused No.1? It is true that bribe recovery is not a matter of much relevance because mostly the public servants are in habit of demanding bribe or illegal gratification from the persons who are in habit of doing wrong and illegal things and also from the persons who are intending to get rid of the procedural obligations and delay by greasing the hands of the authorities. Because, the act of giving bribe is also one of the offence and therefore only the evidence of complainant in all such or similar

cases requires to be scanned closely. The checkered history and character of the complainant has come on record in the present case. It appears that therefore only the complainant was not able to have enough strength / courage to support the prosecution case. Even, in absence of evidence of complainant, the Court can rely on the evidence of Panch Witness (who is an independent person) and convict the accused, as per settled legal position, the Panch Witness is not a trap witness, as he is not interested in the result of the case.

11. On close reading of the Panchnama drawn by the Trapping Officer, it reveals that one clear impression has created in the mind of the learned trial Judge that Trapping Officer has not acted objectively and fairly. The second part of the Panchnama drawn on 29th September, 1988 clearly reveals that Naranbhai, who was selling water on the footpath, was a key person and he was nominated to collect Rs.50/- on behalf of accused No.1 from the complainant and the accused No.1 in turn was to collect the same from Naranbhai. Why the Investigating Officer has not make use of Naranbhai by giving stained currency notes i.e. bribe amount to

him keeping the complainant in background and planting Panch Witness No.1 in the near vicinity or as shadow of Naranbhai Paniwala, is a question in view of nature of demand and mode of receipt selected / opted by accused No.1. When the time was not certain and there was scope of arrival of accused No.1 either during the afternoon hours or even in the evening, the said Panchas again called on 29th September, 1988 at A.C.B. Office. It was possible for the Trapping Officer to call other set of Panchas but there was nothing illegal or improbable in calling the same Panchas. So, this part of Panchnama drawn on 29th September, 1988 clearly reveals that he had put on the same clothes stained with anthracene powder as currency notes were kept in one of the pockets of the trouser of the complainant. On 28th September, 1988, the same muddamal currency notes that were preserved by the Trapping Officer shown to Panch Witness and the muddamal currency notes were kept in the pocket of the complainant. This Panchnama is drawn between 11:05 and 12:00 noon and raiding party had reached at Ashram Road near Ajanta Commercial Center situated in the area known as Income Tax Cross Road. According to Panchnama, as well as, version of the Panch Witness No.1, (Prosecution Witness No.2), the accused No.1

came on scooter. He stopped his scooter where the complainant was standing and had started conversation with him. Accused N.1 told the complainant that he came yesterday and asked about him. The complainant in turn replied that he could not remain present, as he was not able to arrange for money. Further, the complainant also told the accused No.1 that he made arrangement for money. Thereafter accused No.1 asked the complainant to give money to the person who was accompanying with him. Prosecution Witness No.2 (Panch Witness No.1) has stated that on receipt of the signal, A.C.B. Inspector and other members of the raiding party had reached and Prosecution Witness No.2 was asked by Police Inspector that where the muddamal currency notes were lying given by way of bribe and as per say of Prosecution Witness No.2, that currency notes were lying with accused No.2. The map of the area has not been produced, but it emerges from the evidence that it was a public place. The Ashram Road is one of the main road of City of Ahmedabad and reference made with regard to name of Ajanta Commercial Center satisfactorily indicates that it was a commercial and busy area. It is not the say of the Police Inspector or any of the members of the raiding party that they were at visible distance

where the event of passing of muddamal currency notes had occurred.

12. It was impossible for the Police Inspector to stand at a distance where he could visualize the incident of passing of currency notes. He may not hear the conversation but atleast can see the physical gesture of complainant taking out the muddamal currency notes and its acceptance by accused No.2, but no such case is pleaded or placed before the Court. The Prosecution Witness No.2 claims that he was the person who informed the Trap Officer-Police Inspector (Prosecution Witness No.3) that muddamal currency notes were lying with accused No.2. But, Police Witness has not stated anything about earlier conversation that had allegedly taken place between the complainant and accused No.1, wherein the accused No.1 had asked the complainant to bring cigarette packet from nearby Pan Galla. When one of the material part of the Panchnama has not been proved by Prosecution Witness No.2, his presence practically becomes doubtful. When the Prosecution Witness No.2 (Panch Witness No.1) has claimed that he was the informant to the Trapping Officer that, muddamal currency notes are lying with accused No.2,

then, there was no need for Trapping Officer to ask or inquire about the currency notes from the accused themselves. The learned trial Judge ought to have bracketed the inadmissible part of the Panchnama while appreciating the documentary evidence i.e. second part of the Panchnama because at more than one place facts inadmissible in evidence legally are found to have been narrated by Police Inspector-Mr.Vyas. It appears that Police Inspector, Mr.Vyas was an experienced Senior Police Inspector and has earlier also carried out the traps. It is mentioned in the Panchnama that Police Inspector, Mr.Vyas had introduced him as Police Inspector, A.C.B., City of Ahmedabad to Kesarisinh and Kesarisinh was asked not to move and thereafter Police Inspector, Mr.Vyas asked the accused No.1 that where the muddamal currency notes are lying and accused No.1 told the Police Inspector, Mr.Vyas that currency notes are lying with accused No.2, Surajmalsinh. It is recorded in Panchnama that thereafter Police Inspector, Mr.Vyas asked accused No.2 that where are the currency notes. In response the accused No.2 replied that currency notes are lying in the right side rear pocket of his trouser. This is clearly inadmissible evidence being statement of the accused. However, the

same has been considered while evaluating the evidence and distinguishing the strength of the prosecution case. When both the accused were interrogated to trace out the muddamal currency notes by Police Inspector, Mr.Vyas then, there was no need for Mr.Vyas again to ask Prosecution Witness No.2 about the currency notes. Ignoring the inadmissible part of the Panchnama, the Court is supposed to understand the other part of the Panchnama but it is not possible for the Court to ignore one fact that Police Inspector, Mr.Vyas had inquired about the currency notes from the accused. So, the presence of Prosecution Witness No.2 in the vicinity becomes further doubtful. Firstly for not stating anything about the conversation as regards the cigarette packet and the conflict in evidence as to conversation of Panch Witness No.1 with Police Inspector, Mr.Vyas about the place of muddamal currency notes. In such a fact situation, the recovery of muddamal currency notes from accused No.2 comes under great shadow of doubt. The question that why both these witnesses should be believed as trustworthy viz., Prosecution Witness No.2 (Panch Witness No.1) and Prosecution Witness No.3, Police Inspector-Mr.Vyas, has not been legally answered by

the learned trial Judge. On the contrary, the learned Judge has drawn the inferences ignoring the material conflicts that has emerged in the nature of contradictions and omissions so also leading inadmissible evidence recorded in the second part of Panchnama.

13. The obligation on the prosecution is that it should establish (i) the recovery of muddamal currency notes from the conscious possession or the custody of the accused and (ii) its willful acceptance under agreement or understanding that the same has been accepted as illegal gratification or bribe otherwise, it would remain a mere recovery of muddamal currency notes from the custody / possession of the accused. Here, neither there was any understanding between accused No.2 and the complainant nor any agreement. As discussed earlier, there was no demand made by accused No.2. In such a fact situation, whether the accused No.2 was deserving benefit of doubt, is a question that has not been legally and convincingly answered by the learned trial Judge. When the presence of Prosecution Witness No.2 (Panch Witness No.1) in the vicinity where the handing over and taking over of the

muddamal currency notes must have occurred is doubtful and when Prosecution Witness No.2 himself has accepted that he is somewhat hard of hearing, the learned trial Judge ought to have observed that this is a case of mere recovery of muddamal currency notes from the accused No.2 and atleast he may not be aware that the amount that was being given to him is a bribe amount.

14. One more crucial question requires to be discussed is that whether the Police Personnel would have asked the complainant to pay Rs.50/- only per month as an installment, if the complainant was found regularly indulging in selling prohibited liquor. It appears that complainant was otherwise interested in trapping the accused and therefore upon instigation and at the instance of somebody, the trap was arranged. The presence of accused No.2 was accidental and not incidental. It was possible for the accused No.2 to refuse the amount given by the complainant and for that one cogent circumstance that has come on record is the presence of Police Personnel serving and posted in A.C.B. Department. This part has been discussed and referred to while narrating the points as submissions. This part of argument has enough

strength and it is rightly argued that if accused No.2 was knowing one Jayantilal Panchal who was member of a raiding party and if he was really knowing or aware that the amount given to him is a bribe amount, then, accused No.2 would not have accepted the amount. The Police Inspector, Mr.Vyas himself has admitted that before actual raid on 29th September, 1988, he had seen one of the members of his raiding party talking with accused No.2 and thereafter about five to seven minutes, the signal was given. The say of Police Inspector, Mr.Vyas in his deposition makes the case of the prosecution doubtful that the amount accepted by accused No.2 was an acceptance under the understanding or knowledge that the muddamal currency notes is a bribe amount and the same is being given to him against the demand made earlier by accused No.1. When accused No.2 was knowing that Jayantibhai Panchal is posted with A.C.B. Police Station, City of Ahmedabad and he was present in the area and vicinity, the accused would not have accepted the money if it was really a bribe amount. This answer was given during the course of cross-examination by Mr.Vyas, Police Inspector which creates two more crucial questions (i) when the complainant has turned hostile and Prosecution

Witness No.1 has given some evidence of shabby nature why Jayantilal Panchal was not examined because it is possible to infer that as he was very near to the place where the event of bribe amount was allegedly accepted, Jayantilal Panchal must have seen the physical gesture of the complainant and the accused persons and (ii) that if Police Inspector, Mr.Vyas was able to see that accused No.2 and one of the member of the raiding party were talking with each other then, why Police Inspector, Mr.Vyas could not see the accused No.2 accepting the amount of bribe because there is no evidence on record to show that any of the witnesses mainly the Prosecution Witness No.2 (Panch Witness No.1) or complainant or Police Inspector, Mr.Vyas has changed their position. Non-examination of Pan Gallawala would also make the prosecution case doubtful, because it is the say of the prosecution that accused No.1 had compelled the complainant to bring cigarette packet for him and that part of Panchnama has not been proved by Prosecution Witness No.1. In the present case, the person who had made the alleged demand of bribe has not accepted the amount. No marks of anthracene powder were seen either on the clothes or on the body of the accused No.1. The case is that accused No.1

had asked the complainant to handover the bribe amount to accused No.2 and the amount has been recovered from a person who is not responsible for making demand of bribe and / or accepted the muddamal currency notes knowing it to be a bribe amount. It is true that Prosecution Witness No.2 (Panch Witness No.1) has stated in his deposition that accused No.1 told the complainant to handover the amount to a person accompanied with him. But as discussed earlier his presence in the close vicinity is under great shadow of doubt and no circumstance would infer that he was atleast at a distance from where the entire conversation could have been heard otherwise he would have proved the conversation that had taken place between the Police Inspector, Mr.Vyas and both the accused persons as narrated in the Panchnama and the conversation about cigarette packet between the complainant and accused No.1. For short, the learned trial Judge has grossly erred in relying on the evidence of the Prosecution Witness No.2 (Panch Witness No.1) and evidence of Police Inspector, Mr.Vyas on the point of acceptance of the amount of bribe and considering the evidence of these two witnesses as sufficient or adequate to link the accused with the event of acceptance of amount.

15. The learned Judge has referred one decision in case of ***Jainarain Vs. The State of U.P., reported in A.I.R. 1974 SC 226,*** wherein it has been held that conviction on the basis of prosecution evidence consisting only of the witness who had participated in the trap is legal and merely because there is no corroboration, such conviction would not be illegal. It is true that evidence of any one witness is sufficient if, the Court is able to listen the ring of truth in the conversation. Even, if there is no other evidence than the Trap Witness, conviction can be based. But, here the nature of trap arranged and the place where the accused was trapped themselves have added substantially to the argument advanced on the ground of certain improbabilities. The evidence of sole witness is found to be surrounded with improbabilities or the other relevant aspects are throwing shadow of doubt on the testimony of sole witness that to a trap witness, then, it would be risky to record conviction.

15.1 The learned trial Judge has wrongly applied the ratio of the decision in case of Jainarain

(Supra). In this referred decision the Apex Court was dealing with a case of an employee who was serving as Lekhpal in the Consolidation Department. In 1964 consolidation operations were initiated in village Nanka in the district of Sahranpur. A chak was allotted by the Consolidation Officer to one Kala Singh. Kala Singh complained to the consolidation authorities that his chak was less than the allotted area. One Om Prakash Kaushal, Kanungo, and the appellant measured its area. It appears that the area of the chak was found to be more than the allotted area. In this cited decision, the appellant, Jainarain demanded Rs.20/- from Kala Singh for concealing from the Consolidation authorities the excess area in his chak. Kala Singh went to the Deputy Superintendent of Police and made a complaint to him against the appellant, Jainarain. A trap was laid and the appellant, Jainarain accepted initialed currency notes of Rs.20/-. The Deputy Superintendent of Police recovered the said notes from the pocket of the appellant. In this cited decision, prosecution examined Hira Lal Sharma, Deputy Superintendent of Police Kala Singh and Asha Ram. The appellant examined in support of his defence Om Prakash Kaushal and Road Mal. The learned Special Judge disbelieved

the defence witnesses and has relied on the evidence of prosecution witnesses. The High Court also has believed the evidence of Shri Hira Lal Sharma and Kala Singh. Argument was advanced by appellant, Jainarain before the Apex Court was based on the decision in case of Ram Prakash Arora Vs. State of Punjab, reported in A.I.R. 1973 SC 498. But the Apex Court has observed that the cited decision of Ram Prakash Arora is distinguishable. In case of Jainarain (Supra), the Apex Court was satisfied that there is no dispute as to recovery of currency notes from the pocket of the appellant, Jainarain. The appellant himself had not disputed that and the version of the defence witnesses was found not acceptable to the trial Judge. The version of accused-appellant, Jainarain was that the amount of Rs.20/- was given by him to Kala Singh on some earlier date for purchasing ghee for him and as Kala Singh was not able to purchase the ghee he returned the amount to him on that date. As Kala Singh was not a ghee dealer, it was found it was found stringed by the Supreme Court that why the appellant should have asked Kala Singh to purchase ghee from him. So, the acceptance of bribe amount was not seriously disputed and in that background of fact the Apex

Court has observed that version of trap witness can be accepted as reliable piece of evidence.

15.2 There was no scope for the learned trial Judge to place reliance on the ratio of the decision of the Apex Court in case of Jainarain (Supra) to link the accused with the crime. In the present case the trial Court has based on totally different set of facts and nature of evidence. In the same way the learned trial Judge has observed that “in case before me the complaint at Mark 'A' and the Panchnama at Exh.16 are the corroborative piece of evidence.” When the complainant has not supported the case of the prosecution how the complaint could have been read or considered as substantive piece of evidence in favour of the prosecution? The settled law is that complaint can be read for the purpose of corroboration or contradiction only to test the veracity of the complainant and the strength of the case of the prosecution and as observed earlier some material part of Panchnama is inadmissible in evidence, how the Panchnama could have been considered as legal and admissible corroborative piece of evidence. This crucial questions have remained unanswered if the judgment is read in the context of settled legal

position.

16. Prosecution Witness No.2 (Panch Witness No.1) in examination in chief has supported the case of the prosecution and it is also observed by the learned trial Judge that if the cross-examination is seen, it is not possible to say that he has fully supported the case of the prosecution. The finding of the learned trial Judge is that as Prosecution Witness No.2 (Panch Witness No.1) has not denied that he was present when the money was actually given to accused No.2, can be said to be a corroboration of substantive nature. As discussed earlier, if Panch Witness No.1 was really present in the close vicinity of accused No.2 then there was no scope for Police Inspector-Trapping Officer to ask the accused No.1 as to where the muddamal currency notes are lying. The reference of this aspect in the Panchnama at Exh.16 could not have been ignored by the learned trial Judge.

17. The learned trial Judge has further relied upon the decision in case of ***Papa Kamlkhan and Ors. Vs. Emperor, reported in A.I.R. 1935 Bombay 230.*** In

this cited decision, the material part of facts are found in the first reported paragraph of the judgment dictated by (Coram: N.J.Wadia, J.) and the same is reproduced herein after.

> *"....It is not possible to except absolutely independent evidence about the payment of a bribe, and a distinction has to be made between persons who have voluntarily paid a bribe to a public servant in order to secure some advantage for themselves, and persons, such as Krishna, Dadu and Namu in this case, who have been compelled by improper pressure put upon them by a public servant to pay a bribe. In cases of this kind, where the payment of the bribe has not been voluntary, very slight corroboration would be sufficient to make the evidence of such persons admissible against the receiver of the bribe. As regards Babu Saheb, it is true that he was not himself one of the persons concerned in the original offence of theft, and cannot therefore be said to have acted under compulsion. His evidence might perhaps be considered as needing somewhat stronger corroboration than the evidence of Krishna, Dadu and Namu...."*

17.1 In the very judgment Beaumont, C.J. while expressing agreement with the finding of dismissal of appeal has observed as under:

> *".....In my opinion, the rule of the Court which requires corroboration of the evidence of*

an accomplice as against each accused, it is applies at all, applies with very little force to a case like the present, in which the accused is charged with exorting a bribe from other persons. The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, that is the person who pays the bribe, is not a wiling participant in the offence, but is really a victim of that offence. However, in the present case, i quite agree that there is ample corroboration of the direct evidence of bribery in the conduct of accused.....”

17.2 In the above referred decision it was proved beyond doubt that the payment made was bribe amount and the same was not volunteered. Here the case is under great shadow of doubt and it is difficult for the Court to presume that the amount allegedly given to accused No.2 was accepted by him under any understanding or agreement, so also, with knowledge that the same is bribe amount.

17.3 The other four aspects makes the prosecution case doubtful i.e. (i) checkered history of the

accused, (ii) failure of trap on earlier occasion, (iii) non-examination of Pan Gallawala and water-seller-Naranbhai and (iv) no time and place was fixed for accepting amount by any of the two accused.

18. When it is claimed by the prosecution that trap was successfully carried out and the place is a public place that too thickly populated area on a public street, then, it would be advisable for the Court to consider one aspect that whether the accused would accept the bribe amount in public view. There is nothing in evidence to show that any of the accused was in uniform. So, posing himself to be a civilian, the Police Officer may accept the bribe amount, in such a commercial area but, when the accused No.2 himself had talked before some minutes with Jayantilal Panchal, who was undisputedly posted with A.C.B. Police Station and accused No.2 being Police personnel is supposed to know the status and duties of Jayantilal Panchal, would accept any amount that too at the instance of accused No.1, is a question. This fact situation makes the prosecution case more doubtful and it is difficult for the Court to believe that the amount allegedly given to accused No.2 was given as bribe and was accepted as bribe by

accused No.2 especially when accused No.2 was not a party to make any demand of illegal gratification.

19. In the judgment under challenge at running page No.20 and page No.120 of the paper-book one decision viz., A.I.R. 1958 S.C. 1558 is cited. It appears that there is some mistake in mentioning either in the year or page number. So, it is not possible for this Court to make comment in detail qua reasons assigned by the learned trial Judge. It is always advisable to mention the names of parties while referring the judgment so that Superior Court can consider the point of view of the author of the judgment while appreciating and evaluating the judgment under challenge. Here, for the sake of argument if the cited decision is ignored, the reasons assigned by the learned trial Judge is not found convincing because when the learned trial Judge is not placing reliance on the evidence of the complainant, then how this cited decision would help the prosecution is the question. When the learned trial Judge has not believed the evidence of the complainant, then how any part of the complaint can be read substantially as substantive piece of evidence or how the prosecution can seek any

corroboration on such contention of the complainant? This is an appearant error found in the judgment.

20. It is settled legal position that presumption against the appellants-accused can be raised under Section 4 of the Prevention of Corruption Act when the amount has been recovered from the possession of the accused No.1 and this amount is said to be one which was given by the complainant to the accused No.1 otherwise than as legal remuneration and the same was accepted as bribe under some understanding or agreement. However, in number of judgments this Court and the Apex Court has observed that a mere payment of money by the complainant to the accused is sufficient to raise presumption, if it is found that, the payment made was an illegal gratification. In the present case as the evidence is inadequate to establish two material aspects viz.,(i) the amount was given as bribe / illegal gratification to the accused No.2 and (ii) muddamal currency notes when and how were found with accused No.2 and recovered from him, it would not be safe to raise presumption under Section 4 of the Prevention of Corruption Act. It was not safe for the trial Court to raise presumption under Section 4

of the Prevention of Corruption Act. This case may be a case of mere recovery of the muddamal currency notes from accused No.2 and recovery of muddamal currency notes would not make prosecution entitle to get advantage of the presumption that can be raised under Section 4 of the Prevention of Corruption Act nor the accused should be asked to rebut such presumption. If it is legally possible to raise the presumption then only the question to rebut the same would arise. It is also relevant to note that the learned trial Judge has attempted to assign reasons as to why the Court has considered the evidence of Prosecution Witness No.2 (Panch Witness No.1) as evidence of independent person. On the contrary, on close reading of the judgment it emerges that the learned trial Judge was not fully satisfied with the selection of Panch. However, keeping in mind certain difficulties or otherwise inconvincing or hardship as observed, selection of Panch cannot be said to be unfair. The said reason discussed by the learned trial Judge is based on certain extraneous aspects. The learned trial Judge ought to have recorded the clear finding that the Panch selected are the independent, reliable and they have acted voluntarily as independent persons. On the contrary, the learned

Judge has observed as under:

> *".....Thus, it is taking the most pragmatic view that the Court has to reach the conclusions based on the evidence of the Panch Witness. More often than not it becomes wellnigh impossible for the prosecution to get witness of perfect nature who is prepared to risk and come before the Court.....".*

21. Both the accused persons were subjected to a grave charge for the offence punishable under Sections 13 (1) (d) (i), (ii) and (iii) of the Prevention of Corruption Act and the prosecution was under obligation to prove the case beyond reasonable doubt. The Court is of the view that the prosecution under such set of facts and circumstances cannot succeed and has failed in establishing the charges levelled against the appellants-accused and the appellants-accused should be given the benefit of doubt.

22. Present appeal, therefore, requires to be allowed and is accordingly allowed. The judgment and order of conviction and sentence passed by the learned Special Judge, City Civil Court, Ahmedabad in Special Case No.24 of 1989, on 25th October, 1991, is hereby quashed and set aside. Both the appellants-

accused are given the benefit of doubt and are acquitted from the charges levelled against them. Bail Bond executed by the appellants-accused shall stand discharged. Amount of fine, if paid, by the accused persons, be refunded to them on proper identification. Order and Directions accordingly.

(C.K.BUCH, J.)

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